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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1965

No. 812

ROBERT C. HEMPHILL and MAXINE C. HEMPHILL, his wife, d/b/a CAPITOL SKATELAND,

Appellants.

v.

WASHINGTON STATE TAX COMMISSION,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS

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Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, Appellee moves to dismiss this appeal on the grounds that the appeal presents no substantial federal question.

QUESTION PRESENTED

Does the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution forbid a state to impose a sales tax upon admission fees for roller skating, when no sales tax is imposed upon charges for the sport of bowling?

STATUTES INVOLVED

The pertinent statutory provisions have been set out in Appendix B of the Jurisdictional Statement of Appellants. For convenience of this Court, we repeat the key statutory provision involved.

> "The term 'sale at retail' or 'retail sale' shall include the sale of or charge made for personal, business or professional services, including amounts designated as interest, rents, fees, admission, and other service emoluments however designated, received by persons engaging in the following business activities: (a) *amusement and recreation businesses* including but not limited to golf, pool, billiards, skating, ski lifts and tows and others *but excluding bowling* and excluding admission charges which may be subject to county or city admissions taxes levied under authority granted in RCW 35.21.280 or chapter 36.38 RCW; * * *" 1961 Ex. Ses. Laws, ch. 24, § 1. (Italics ours.)

ARGUMENT

The decision of the Washington State Supreme Court is clearly correct. A brief review of pertinent decisions of the United States Supreme Court confirms this.

The basic principle involved in this appeal has been stated by this Court as follows:

> "* * * it has long been settled that a classification, though discriminatory, is not arbitrary nor violative of the Equal Protection Clause of the Fourteenth Amendment *if any*

state of facts reasonably can be conceived that would sustain it." Allied Stores of Ohio v. Bowers, 358 U.S. 522, 528 (1959). (Italics ours.)

Of even more importance than the broad statement of this principle is its specific application by this Court.

In *Brown-Forman Co. v. Kentucky*, 217 U.S. 563 (1910), this Court held that Kentucky could impose a tax on the business of rectifying, compounding, or blending whiskey, even though no tax was imposed upon the making of straight whiskey. Certainly, by any conceivable criteria, the difference between bowling and skating is greater than the difference between blended and straight whiskey.

In *Heisler v. Thomas Colliery Co.*, 260 U.S. 245 (1922), this Court held that Pennsylvania could impose a tax upon anthracite coal, even though no tax was imposed upon bituminous coal. Certainly the differences between bowling and skating are more obvious and substantial than the differences between these two types of coal.

In *A. Magnano Co. v. Hamilton*, 292 U.S. 40 (1934), this Court held that Washington could impose a tax of fifteen cents per pound on butter substitutes, even though no tax was imposed upon butter itself.

In view of these decisions, it is simply too late in the day for Appellants to contend that a state must either tax all forms of the amusement and recreation business or must tax none. A state may, under these

decisions, single out bowling in imposing a tax; and, by the same token, it may single out bowling in granting an exemption. "A legislature is not bound to tax every member of a class or none." *Carmichael v. Southern Coal and Coke Co.*, 301 U. S. 495, at 509 (1937).

Moreover, it is difficult to understand how the question presented in this appeal is of such substantial significance outside the State of Washington as to merit plenary review by this Court. In fact, it is no longer of any continuing significance in the State of Washington itself. By section 1, chapter 173, Laws of 1965, Ex. Ses., the sales tax was imposed upon bowling, and the prior exclusion of bowling which gave rise to this case was deleted.

We submit, therefore, that this appeal presents no substantial federal question, and that the appeal should be dismissed.

Respectfully submitted,

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